No. 96-1400

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF CALIFORNIA, STATE LANDS COMMISSION,
Petitioner,
v.
DEEP SEA RESEARCH, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici will address the following question:

Whether the State of California must prove that it has a colorable claim of title to the shipwreck *Brother Jonathan* in order to assert successfully its Eleventh Amendment immunity from suit in federal court.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. The Eleventh Amendment is one of the principal constitutional protections of state sovereignty. Forty States have statutes governing the management and protec-

tion of shipwrecks and other historically significant resources, *see* Pet. 14-15 & n.5, and at least thirty-eight States assert title to shipwrecks and other "historically significant" resources. *Id.* at 17 n.7. This case thus presents an issue of fundamental importance to *amici* and their members—whether a federal admiralty court can adjudicate an unconsenting State's claim of title to property by requiring the State to demonstrate that it has a colorable claim to the property as a condition of its successful assertion of Eleventh Amendment immunity.

The court of appeals' imposition of this requirement is inconsistent with the Eleventh Amendment's fundamental purpose of "'prevent[ing] the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). It is based on an erroneous reading of this Court's decision in *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699-700 (1982), which clearly rejected such a requirement when a suit seeks to adjudicate a State's title to property. Deep Sea's suit, while brought in federal admiralty court as an *in rem* proceeding, nonetheless seeks to adjudicate California's title to the *Brother Jonathan* without its consent. To the extent the suit seeks an adjudication of the State's title, it is therefore barred by the Eleventh Amendment.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.[1]

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

STATEMENT

Respondent Deep Sea Research, a California corporation, brought this *in rem* proceeding in federal district court seeking title and exclusive salvage rights to the wreck of the *Brother Jonathan* and its cargo. It is stipulated that the vessel, which sank off the California coast on July 30, 1865, while on a voyage from San Francisco to Puget Sound, "is located upon [the] submerged lands of the State of California." Pet. App. 3a.

The California State Lands Commission intervened in the proceeding solely to move to dismiss the suit as barred by the Eleventh Amendment. The State claimed title to the wreck under the Abandoned Shipwreck Act (ASA), 43 U.S.C. §§ 2101-2106, which vests in a State title to abandoned wrecks that are either embedded in a State's submerged lands or lie on its submerged lands and are "determined eligible for inclusion in the National Register" of Historic Places. *Id.* § 2105. The State also asserted title to the wreck under the Submerged Lands Act, 43 U.S.C. §§ 1301-15, which vests in a State "title to and ownership of the lands beneath navigable waters within the boundaries of the respective State[]" with "the right and power to manage, administer, lease, develop, and use the said lands," 43 U.S.C. § 1311(a), and the California wreck statute, which vests in the State "title to all abandoned shipwrecks and all archaeological sites and historic resources on or in the tide and submerged lands of California." Cal. Pub. Res. Code § 6313(a).

Notwithstanding that the State itself asserted title to the wreck, the district court proceeded to conduct an evidentiary hearing on whether the *Brother Jonathan* was abandoned, embedded, or determined

eligible for inclusion in the National Register. In ruling on the State's Eleventh Amendment motion, the court rejected the State's contention that it "need not prove that the [ASA] actually appl[ies] to the vessel before the district court is divested of jurisdiction." Pet. App. 25a. According to the court, "a party asserting sovereign immunity will have to at least prove, by a preponderance of the evidence, that the privilege applies." *Id.* at 26a. "Thus, to establish the *existence* of a claim, the State must establish, by a preponderance of the evidence, that the ASA applies to the vessel at issue." *Id.* In the district court's view, only "[o]nce the State establishes that the ASA applies to an abandoned shipwreck [is] the federal court . . . divested of jurisdiction." *Id.* at 27a.

The district court also rejected the State's assertion that the suit was barred because it had a colorable claim to the *Brother Jonathan* under the California wreck statute. According to the court, "[i]f a State alleges that it has a 'colorable claim' to a shipwreck under state law, the State must demonstrate whether, and to what extent, its law regarding shipwrecks co-exists with, or is preempted by, the ASA." *Id.* Because in the district court's view the State failed to carry its burden of proving that the *Brother Jonathan* was within the category of shipwrecks covered by the ASA, *see id.* at 29a-43a, and "there can be no doubt that [the State's wreck statute], insofar as it asserts title to shipwrecks that are not covered by the ASA, is preempted," *id.*, at 45a, it denied the State's motion to dismiss the suit as barred by the Eleventh Amendment. *See* Pet. App. 57a.

The Ninth Circuit affirmed. The court first rejected the State's argument that the ASA does not preempt its wreck statute, concluding that "§ 6313

is preempted to the extent that it gives the State title to shipwrecks that do not meet the requirements of the ASA." *Id.* at 8a-9a. Only then did the court analyze whether the State was entitled to Eleventh Amendment immunity. *Id.* at 9a. Because the ASA "preempted state laws which purported to take title to all shipwrecks on their submerged lands, at least to the extent that such laws took title to shipwrecks that did not meet the requirements of the ASA," the court reasoned "that a more extensive showing is required in this case, in which the ASA applies, to make a colorable claim to the *Brother Jonathan*." *Id.* at 11a.

Moreover, because "a federal court has both the power and duty to determine whether a case falls within its subject matter jurisdiction, . . . it was appropriate for the district court to require the State to present evidence that the ASA applied to the *Brother Jonathan*, *i.e.*, that it was abandoned and either embedded or eligible for listing in the National Register, before dismissing the case." *Id.* at 11a. If it held otherwise, the court reasoned, "the State could receive immunity simply by asserting that it was entitled to it." *Id.* In the Ninth Circuit's view, "[f]or a federal court to renounce jurisdiction over an admiralty case on the basis of a mere assertion of entitlement to immunity on the part of the State is inconsistent with the court's duty to assess whether it has jurisdiction." *Id.* at 11a-12a.

The Ninth Circuit also rejected the State's contention that the district court erred in "imposing on the State the burden of proving by a preponderance of the evidence that the ASA applies to the *Brother Jonathan*." *Id.* at 12a. According to the court, "the party asserting [Eleventh Amendment] immunity has

the burden to establish that it is entitled to immunity even if the determination of that issue touches the merits of the claim." *Id.* at 13a.

SUMMARY OF ARGUMENT

1. The Court has long recognized that the Eleventh Amendment bars the federal courts from exercising jurisdiction over a suit by a private party which seeks to adjudicate an unconsenting State's interest in property. This fundamental constitutional principle, which exists to protect the dignity and respect owed the States as co-sovereigns in the federal system, accordingly prohibits the federal admiralty courts from exercising jurisdiction over an *in rem* proceeding which would adjudicate a State's interest in a shipwreck. *See, e.g., Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699-700 (1982).

Ignoring the clear mandate of this Court's cases, the court of appeals imposed a novel rule requiring the State to prove by a preponderance of the evidence that it has a colorable claim to the *Brother Jonathan* in order to invoke its Eleventh Amendment immunity. Eight justices in *Treasure Salvors* held the view, however, that a federal admiralty court cannot adjudicate a State's interest in property without the State's consent. Most significantly, the eight justices agreed on this point even though a plurality of the Court concluded that a warrant to arrest artifacts in the possession of state officials was not directed at the State itself because the State had no colorable claim to the property. It was thus common ground among the eight justices that a federal court cannot adjudicate the State's interest in property, notwithstanding that the State does not have a colorable claim to the property.

The reasoning of *Treasure Salvors* thus firmly repudiates the court of appeals' colorable claim requirement. Moreover, the imposition of such a requirement is inconsistent with the Eleventh Amendment's purpose of protecting the States from the indignity of being subjected to the coercive process of the federal courts at the behest of private parties. As the Court's cases make clear, when a suit is initiated by private parties, a federal court cannot adjudicate a State's interest in property without its consent and cannot inquire into whether the State has a colorable claim to the property.

2. Application of the foregoing principles demonstrates that the Eleventh Amendment bars the exercise of federal admiralty jurisdiction over California in this proceeding. Deep Sea's suit is in all but form a suit against the State of California which seeks to adjudicate the State's interest in property without its consent. While California asserts title to the *Brother Jonathan*, its officials are not in physical possession of the wreck and do not hold any property recovered from it. The Eleventh Amendment therefore requires the federal admiralty court to dismiss California from the suit without inquiring into whether the State has a colorable claim to the wreck and its artifacts. The judgment of the court of appeals should therefore be reversed.

ARGUMENT

THE ELEVENTH AMENDMENT BARS A FEDERAL COURT FROM ADJUDICATING CALIFORNIA'S CLAIM TO THE *BROTHER JONATHAN*

This Court's cases clearly establish that, in the absence of California's consent, Deep Sea's suit seeking title to the wreck of the *Brother Jonathan* cannot

be brought in federal court without violating the Eleventh Amendment. *See, e.g., Florida Dept. of State v. Treasure Salvors, Inc.*, 468 U.S. 670, 699-700 (1982); *In re New York (II)*, 256 U.S. 503, 511 (1921). Ignoring these holdings, the court of appeals created a novel rule imposing on the State the burden of showing by "a preponderance of the evidence" that it has "a colorable claim to the *Brother Jonathan*" in order to obtain a dismissal from the suit under the Eleventh Amendment "even if the determination of [this] issue touches the merits of the claim." Pet. App. 13a.

There is no precedent for the court of appeals' requirement that the State prove it has a colorable claim to property in order to invoke the Eleventh Amendment. Indeed, as this Court's cases make clear, such a result is irreconcilable with the Amendment's purpose of protecting the dignitary interests of the States. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Consistent with the Amendment's purposes, *Treasure Salvors* establishes that a federal court cannot adjudicate a State's interest in property without its consent and cannot even inquire as to whether the State has a colorable claim to the property. *See* 468 U.S. at 682, 699-700; *id.* at 702 (White, J., joined by Powell, Rehnquist & O'Connor, JJ.) (concurring in part and dissenting in part). The judgment of the court of appeals should therefore be reversed.

A. A State Is Not Required To Prove A Colorable Claim To Property In Order To Invoke Its Eleventh Amendment Immunity

This Court has long "'understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'"

Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1122 (1996) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)). As the Court recently reaffirmed, "[t]hat presupposition . . . has two parts: first, that each State is a sovereign entity in our federal system; and second, that '"[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."'" *Id.* (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (quoting *The Federalist* No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton))). "For over a century," the Court has "reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Seminole Tribe*, 116 S.Ct. at 1122 & n.7 (quoting *Hans*, 134 U.S. at 15). *See also id.* at n.7 (collecting cases); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (The Eleventh Amendment's "greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III.").

The Court has thus recognized the fundamental role the Eleventh Amendment performs in protecting the dignitary interests of the States. For more than a century the Court has observed that "'[t]he very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Puerto Rico Aqueduct*, 506 U.S. at 146 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). *See also Idaho v. Coeur d'Alene Tribe*, 117 S.Ct. 2028, 2033 (1997) ("the dignity and respect afforded a State, which the immunity is designed to protect, are placed in jeopardy whether or not the

suit is based on diversity jurisdiction"). The Court has accordingly recognized the Amendment as being "a fundamental constitutional protection," *Puerto Rico Aqueduct*, 506 U.S. at 145, which "is concerned not only with the States' ability to withstand suit, but with their privilege not to be sued." *Id.* at 147 n.5.

This "'fundamental' constitutional rule that a State may not be sued in federal court without its consent," *id.* at 145 n.4 (quoting *In re New York (I)*, 256 U.S. 490, 497 (1921)), has also long been held to prohibit a party other than the United States or one of the States from bringing a suit in federal court which seeks to adjudicate a State's interest in property. *See Coeur d'Alene Tribe*, 117 S.Ct. at 2040-43; *In re New York (II)*, 256 U.S. at 511. It applies as well to a suit *in rem* brought under federal admiralty jurisdiction. *See Treasure Salvors*, 458 U.S. at 682, 700; *In re New York (II)*, 256 U.S. at 511; *cf. In re New York (I)*, 256 U.S. at 497-98.

In *In re New York (II)*, the administrators of an estate brought a proceeding *in rem* in federal district court against a state-owned vessel. 256 U.S. at 508. The New York State Attorney General entered a special appearance challenging the court's jurisdiction, filing a verified suggestion that the State owned the vessel and asserting that the vessel was immune from admiralty process. *Id.* at 508-09. The district court overruled the suggestion and issued process resulting in the arrest of the vessel. *Id.* at 509.

Thereafter, the State Attorney General petitioned for writs of prohibition and mandamus directing the district court "to desist from further exercise of [its] jurisdiction" and to enter "an order declaring the

[vessel] to be immune from arrest." *Id.* This Court took the extraordinary step of granting the writs, holding that "[t]he principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process in rem applies with even greater force to exempt public property of a state used and employed for public and governmental purposes." *Id.* at 511.[2]

In *Treasure Salvors*, the Court held that the Eleventh Amendment's prohibition against a federal court's adjudication of a State's interest in property applies as well to an *in rem* proceeding brought by a salvor seeking title to a wreck and its artifacts.

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[2] *In re New York (II)* also answers the court of appeals' contention that its colorable claim requirement is necessary because "[o]therwise . . . the State could receive immunity simply by asserting that it was entitled to it." Pet. App. 11a. There the Court ordered the dismissal of the proceeding based upon the New York State Attorney General's verified suggestion that the State owned the vessel. *See* 256 U.S. at 508-09. *In re New York (II)* thus makes clear that a State's good faith assertion in legal documents that it has title to a vessel is all that is required for a State successfully to assert its Eleventh Amendment immunity and divest a federal court of jurisdiction over the proceeding.

Here, California has filed a motion accompanied by a memorandum with supporting affidavits asserting that it has a property interest in the *Brother Jonathan*. *See* J.A. 80-120. Like the verified suggestion in *In re New York (II)*, the California Attorney General's submission of these documents, which are governed by Rule 11 of the Federal Rules of Civil Procedure, required the federal district court to dismiss the State from the proceeding. The dignity and respect which is owed a State as a co-sovereign in the federal system is offended where, as here, a federal court refuses to accept the submission of the State's chief legal officer.

See 458 U.S. at 682, 699-700. While five justices held that the Eleventh Amendment did not bar a federal admiralty court from issuing process arresting artifacts held by a State's officials, eight justices agreed that "[t]he court did not have power . . . to adjudicate the State's interest in the property without the State's consent." *See id.* at 682 (Stevens, J., joined by Burger, C.J., Marshall, J., & Blackmun, J.); *see also id.* at 699-700; *id.* at 702-703 & n* (White, J., joined by Powell, Rehnquist, & O'Connor, JJ.) (expressly noting the agreement of eight members of the Court).

Deep Sea's *in rem* suit seeks a declaration that it has title to the wreck of the *Brother Jonathan*, its cargo and artifacts as "against all the world." J.A. 55 (Verified Complaint). Notwithstanding that in keeping with admiralty practice, the State of California was not named as a party in this *in rem* suit, *see* Pet. App. 3a, "[t]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading." *Coeur d'Alene Tribe*, 117 S.Ct. at 2034; *see also In re New York (I)*, 256 U.S. at 500. Deep Sea has stipulated that the *Brother Jonathan* "is located upon submerged lands of the State of California," Pet. App. 3a, and California asserts title to abandoned shipwrecks lying "on or in the tide and submerged lands" of the State. Cal. Pub. Res. Code § 6313(a). "[T]he essential nature and effect of the proceeding," *In re New York (I)*, 256 U.S. at 500, demonstrates that Deep Sea's suit seeks no less than title to the *Brother Jonathan* at the State's expense. The suit thus would enlist the federal courts in the adjudication of California's interest in the wreck without its consent, a clear violation of the Eleventh Amendment. *See Treasure Salvors*, 458 U.S. at 682, 699-700; *see also id.* at 702-17 (White, J., joined by Powell, Rehnquist and O'Connor, JJ., concurring in part and dissenting in part); *In re New York (II)*, 256 U.S. at 509-11; *Coeur d'Alene Tribe*, 117 S.Ct. at 2040-43.

This well established rule compels the dismissal of the State from Deep Sea's suit. The court of appeals not only ignored this rule, it compounded its error by imposing on the State the requirement that it have "a colorable claim to the *Brother Jonathan*," Pet. App. 7a, and that it "prove" as much "by a preponderance of the evidence" in order to invoke the Eleventh Amendment. *Id.* at 14a. It further erred in proceeding to analyze whether Cal. Pub. Res. Code § 6313, the state law under which California claims title to the *Brother Jonathan*, is preempted by the Abandoned Shipwreck Act, 43 U.S.C. §§ 2101-2106, before determining whether the State was entitled to invoke the Eleventh Amendment.

This approach, which "for all practical purposes adjudicates the State's title," *Treasure Salvors*, 458 U.S. at 703 (White, J., joined by Powell, Rehnquist and O'Connor, JJ., concurring in part and dissenting in part), reduces the Eleventh Amendment to the proposition " 'that suits against a state are permitted by the eleventh amendment if the result is that the state loses.' " *Id.* (citation omitted). It is antithetical to the fundamental purpose of the Eleventh Amendment, which is " 'to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.' " *Puerto Rico Aqueduct*, 506 U.S. at 146 (quoting *In re Ayers*, 123 U.S. at 505).[8]

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[8] Unlike the California State Fair and district agricultural associations whose status as arms of the State were at issue

Consistent with this understanding of the Eleventh Amendment's purpose, eight justices in *Treasure Salvors* at least implicitly rejected the notion that a State must assert a colorable claim to property in order to successfully invoke the Amendment. *See* 458 U.S. at 682, 699-700 (Stevens, J., joined by Burger, C.J., Marshall & Blackmun, JJ.); *see also id.* at 702-717 (White, J., joined by Powell, Rehnquist, & O'Connor, JJ.). In *Treasure Salvors*, the Court's holding that a federal admiralty court could issue a warrant to arrest the artifacts held by the State's officials without violating the Eleventh Amendment rested on the conclusion that the process was not directed at the State itself because the officials "had no colorable basis on which to retain possession of the artifacts." 458 U.S. at 682.

The Court's determination that the State's officials did not have a "colorable basis" for holding the artifacts was based on its examination of the State's own authority to assert possession. *Id.* at 694-97. In particular, the Court examined the contract between the salvor and the State and noted that it was predicated on a state statute which asserted title over treasure trove and artifacts " 'which have been abandoned on state-owned lands or state-owned sovereignty submerged lands.' " *Id.* at 695 (quoting Fla. Stat. § 267.061(1)(b) (1974)). Subsequent to the contract, however, the Court in *United States v. Florida*,

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in *ITSI TV Productions, Inc. v. Agricultural Associations*, 3 F.3d 1289 (9th Cir. 1993), there is no dispute that the California State Lands Commission is an arm of the State. Indeed, the court of appeals' opinion repeatedly recognizes that the State itself is the party. *See generally* Pet. App. 3a-19a. There is thus no justification for the lower courts' imposition of this novel requirement.

425 U.S. 791 (1976), determined that the seaward boundary of the State's submerged lands did not extend to the site of the wreck. *See* 458 U.S. at 676 & n.6. Because "[t]he authority of state officials to claim the artifacts was derived solely from" the State's wreck statute which was "inapplicable in this case," the *Treasure Salvors* Court concluded that the "officials do not have a colorable claim to possession of the artifacts." *Id.* at 695-97. The Court thus concluded that the officials could not "invoke the Eleventh Amendment to block execution of the warrant of arrest." *Id.* at 697.

Even the *Treasure Salvors* plurality, however, recognized that the Eleventh Amendment did not, in the absence of the State's consent, permit a federal court "determination of *the State's* ownership of the artifacts." 458 U.S. at 699 (emphasis added). It thus reversed that part of the judgment of the court of appeals which had "improperly adjudicated the State's right to the artifacts." *Id.* at 700.

Most significantly, it did so notwithstanding that the State did not have a colorable claim to the artifacts. *See* 458 U.S. at 694-97. Justice White (joined by Justices Powell, O'Connor and then-Justice Rehnquist) agreed with the plurality on this point, observing that "[b]y holding that '[t]he court [of appeals] did not have power . . . to adjudicate the State's interest in the property without the State's consent,' the Court properly rejects this novel conception of the Eleventh Amendment." *Id.* at 703 (quoting *id.* at 682). It was therefore common ground among eight justices that a State is not required to assert a colorable claim to property in order to invoke the Eleventh Amendment. *See id.* at 703 n.*.

The reasoning of *Treasure Salvors* thus firmly repudiates the court of appeals' requirement that the State demonstrate that it has a colorable claim to the *Brother Jonathan* in order to invoke the Eleventh Amendment. The court of appeals has simply misread this Court's cases which have imposed such a requirement only for the purpose of determining whether a suit against an official who is in possession of property is a suit against the sovereign. *See Treasure Salvors*, 458 U.S. at 684-89 (discussing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Tindal v. Wesley*, 167 U.S. 204 (1897)).[4]

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[4] Even where the Court has allowed a suit against an official to recover property to go forward, the Court has made clear that the judgment cannot bind the State. *See Treasure Salvors*, 458 U.S. at 687-88, 699-700; *Tindal*, 167 U.S. at 223. As the Court in *Tindal* explained:

> It is said that the judgment in this case may conclude the state. Not so. It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. The state not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the state to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute.

167 U.S. at 223.

In contrast, the court of appeals' decision that California is not entitled to Eleventh Amendment immunity would result in a federal court judgment that binds the State. Because California has not consented to this suit, it is barred by the Eleventh Amendment.

The court of appeals sought to justify its requirement by asserting that because "a federal court has both the power and duty to determine whether a case falls within its subject matter jurisdiction . . . it was appropriate for the district court to require the State to present evidence that the ASA applied to the *Brother Jonathan* . . . before dismissing the case." Pet. App. 11a. The court's statement simply highlights its disregard of fundamental constitutional principles.

Most fundamentally, "[f]ederal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). As this Court recently reaffirmed, "[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (citations omitted). A leading authority accordingly explains:

> [B]ecause it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if the federal courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of that court. The presumption is that a federal court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists. Thus the facts showing the existence of jurisdiction must be affirmatively alleged in the complaint. If these facts are challenged, the burden is on the party claiming jurisdiction to demonstrate that the court has jurisdiction over the subject matter.

13 Charles A. Wright *et al.*, *Federal Practice And Procedure* § 3522, at 61-65 (2d ed. 1984) (footnotes omitted).

Because the ASA supersedes the doctrines of salvage and finds, it divests the federal admiralty courts of jurisdiction over numerous shipwrecks. *See Zych v. Unidentified, Wrecked And Abandoned Vessel*, 941 F.2d 525, 531 (7th Cir. 1991) ("the purpose of the ASA was not simply to rearrange substantive remedies but to transfer management of and litigation over embedded shipwreck sites from the federal courts to the states"). Consistent with the traditional presumption against the exercise of federal jurisdiction, *see Kokkonen*, 511 U.S. at 377, the burden of proving the existence of federal admiralty jurisdiction lies with those parties asserting that the ASA does not apply to a wreck; it does not lie with the State to disprove the existence of admiralty jurisdiction.

Because Deep Sea seeks to invoke federal admiralty jurisdiction, it has the burden of proving that the *Brother Jonathan* is not a shipwreck that is covered by the ASA. Even if the Constitution did not recognize the States' Eleventh Amendment immunity, the lower federal courts still could not impose on California the burden of "present[ing] evidence that the ASA applied to the *Brother Jonathan* . . . before dismissing the case." Pet. App. 11a; *see also id.* at 27a (district court). The burden of establishing the propriety of federal admiralty jurisdiction remained at all times with Deep Sea; the lower courts erred by recasting this burden and shifting it to the State.

B. Federal Admiralty Jurisdiction Over California's Claim of Title Is Barred By The Eleventh Amendment

Applying the well-established principles of this Court's Eleventh Amendment jurisprudence, it is clear that the federal admiralty court cannot exercise jurisdiction over Deep Sea's suit to the extent it seeks to adjudicate California's title to the *Brother Jonathan*. The State's motion to be dismissed from the proceeding should therefore have been granted.

Deep Sea's suit is "in all but form" a suit against the State of California which seeks to adjudicate the State's interest in property without its consent. *Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 717 F.2d 6, 8 (1st Cir. 1983). While California asserts title to the *Brother Jonathan*, its officials are not in physical possession of the wreck and do not hold any property recovered from it. The Eleventh Amendment therefore required the federal admiralty court to dismiss the State from the suit without inquiring into whether it has a colorable claim to the wreck and its artifacts. As the First Circuit has explained, "[o]nce it is determined that [an] in rem action is directed against the Commonwealth itself and seeks to have a federal court adjudicate the Commonwealth's interest in the disputed property, a federal court 'need not reach the colorability of the Commonwealth's claim.'" *Fitzgerald v. Unidentified Wreck & Abandoned Vessel*, 866 F.2d 16, 18 (1st Cir. 1989) (quoting *id.*). *See also Zych v. Wrecked Vessel Believed To Be The Lady Elgin*, 960 F.2d 665, 670 (7th Cir. 1992) ("The strength of the state's legal position is irrelevant; the eleventh amendment prevents the district judge from exercising jurisdiction.").[5]

[5] The proper resolution of the State's assertion of Eleventh Amendment immunity precluded the Ninth Circuit from

Once the State asserted that it has title to the *Brother Jonathan*, the Eleventh Amendment barred the federal admiralty court from exercising jurisdiction over California in this suit. The district court's

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analyzing whether the ASA preempts Cal. Pub. Res. Code § 6313. *Amici* note, however, that the Ninth Circuit mistakenly construed Section 7 of the ASA as "mak[ing] clear that Congress intended to transfer title to the states only for shipwrecks that meet the requirements of the ASA." Pet. App. 8a.

Contrary to the reasoning of the court of appeals, the relevant question for preemption analysis is whether the States can continue to claim title to abandoned wrecks under their state wreck statutes in the same manner that sovereigns have asserted such a prerogative for centuries. *See, e.g.*, 1 William Blackstone, *Commentaries On The Laws Of England* 290-92 (G. Sharswood ed., 1904); 2 James Kent, *Commentaries On American Law* 359 (O.W. Holmes, Jr., ed., 12th ed. 1873) ("if discovered on the coast, or in the waters within the jurisdiction of a state, [shipwrecks] are, by statutes in the several states, to be kept for the owner, if redeemed within a year; and if not, they are to be sold, and the net proceeds, deducting costs and salvage, appropriated to public uses"). Whether Congress intended to transfer title to only the types of wrecks encompassed by the ASA is irrelevant if the States, as a matter of their sovereign authority, can claim title to any abandoned shipwreck located in their territorial waters.

Second, the language of Section 7 is simply not susceptible to the meaning which the court of appeals ascribes to it. The text of Section 7 that the ASA "shall not change the laws of the United States" refers to federal law. *Cf., e.g., Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968). Consistent with the text, the relevant legislative history indicates that Section 7 was intended to ensure that the ASA was not construed as altering other federal statutes applicable to shipwrecks such as Title III of the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §§ 1431-39, which authorizes "the Commerce Department to designate and manage shipwrecks within national marine sanctuaries in state waters."

various orders arresting the vessel and granting Deep Sea exclusive possession of the *Brother Jonathan* were thus *ultra vires* and should be vacated; the State's motion to be dismissed from the proceeding should be granted.

H. Rep. No. 514(II), 100th Cong., 2d Sess. 9, *reprinted in* 1988 U.S.C.C.A.N. 370, 377. *See also* H. Rep. No. 514(I), 100th Cong., 2d Sess. 4, *reprinted in* 1988 U.S.C.C.A.N. 365, 368. The provision says nothing about the ASA's relationship with state law. It thus falls far short of showing the " 'clear and manifest purpose' " on the part of Congress necessary to hold that the ASA preempts the States' " 'historic police powers.' " *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citation omitted).

Third, the Ninth Circuit's cursory holding that the ASA preempts state law because its purposes conflict with those of state wreck statutes is premised on the unstated conclusion that the Federal Government has superior title to abandoned wrecks located within a State's territorial waters. This premise is not free from doubt and raises an important question as to the scope of the Submerged Lands Act, 43 U.S.C. §§ 1301-15, and the substantial constitutional question as to whether the States, in forming the Union, ceded to the Federal Government their sovereign prerogative to assert title to abandoned wrecks located within their waters. *See Kent's Commentaries* at 359. If the States possess superior title, the Ninth Circuit's holding further raises the serious constitutional question of whether the federal government can divest a State of its title to property without paying just compensation. *See, e.g., Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 291 (1983).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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